

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Cleco Power LLC; Dalton Utilities (acting as agent for the City of Dalton, Georgia); Entergy Services, Inc. (acting as agent for Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc.); Georgia Transmission Corporation; JEA (formerly Jacksonville Electric Authority); MEAG Power; Sam Rayburn G & T Electric Cooperative Inc.; South Carolina Public Service Authority; Southern Company Services, Inc. (acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company); and the City of Tallahassee, Florida.

Docket No. EL02-101-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued October 10, 2002)

1. On June 27, 2002, SeTrans Sponsors¹ filed a petition for declaratory order (Petition) concerning the proposed SeTrans Regional Transmission Organization (SeTrans RTO or SeTrans). SeTrans Sponsors request that the Commission grant their Petition and issue a Declaratory Order determining that: (i) the governance structure and

¹Cleco Power LLC (Cleco); Dalton Utilities (acting as agent for the City of Dalton, Georgia); Entergy Services, Inc. (acting as agent for Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc.) (collectively, Entergy); Georgia Transmission Corporation (GTC); JEA (formerly Jacksonville Electric Authority); MEAG Power; Sam Rayburn G & T Electric Cooperative Inc. (Sam Rayburn); South Carolina Public Service Authority (Santee Cooper); South Mississippi Electric Power Association (SMEPA); Southern Company Services, Inc. (acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company) (collectively, Southern); and the City of Tallahassee, Florida.

business model of the proposed SeTrans RTO satisfies the criteria set forth in Order No. 2000² and subsequent Commission precedent referred to below; and (ii) the process by which the SeTrans Independent System Administrator (ISA) is to be chosen also satisfies those criteria. SeTrans Sponsors' Petition also seeks to show that its draft protocols will support the proposed governance structure and business model, and will work to satisfy the requirements of Order No. 2000. In this order, we find that SeTrans Sponsors' proposed business model and ISA selection process, and generally the governance structure complies with Order No. 2000. In addition, the order provides guidance on certain issues which SeTrans Sponsors have identified as critical to forming the SeTrans RTO.

2. Because there is a broad overlap of issues in the proposal before us and in the Commission's recently issued notice of proposed rulemaking on standard market design (SMD NOPR),³ the Commission has reviewed the SeTrans proposal in light of the principles and proposed requirements contained in the SMD NOPR. As we recently stated with regard to another pending RTO proposal, we look at this filing as both informing, and being informed by, the SMD NOPR.⁴ Our review of the SeTrans proposal therefore not only approves or conditionally approves various elements of the proposal, but also provides guidance in areas which we do not find consistent with the basic principles of the SMD NOPR. Further, because of the extensive efforts committed by industry participants to developing a framework for a sound RTO proposal here, we take this opportunity to clarify that it is not this Commission's intent to overturn, in the final SMD rule, decisions that are made in this docket. In other words, unless the Commission has specifically indicated in this order that an element of the RTO proposal is inconsistent with the SMD proposal or needs further work in light of the SMD proposal, we do not intend, in the final SMD rule, to revisit prior approvals or acceptances of RTO provisions because of possible inconsistencies with the details of the final rule. This Commission intends to take all appropriate steps at the final rule stage of the SMD rulemaking to ensure that, to the extent we have already approved or conditionally approved RTO elements, these approvals would remain intact.

²Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), FERC Stats. & Regs. ¶ 31,092 (2000), aff'd, Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

³Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, 100 FERC ¶ 61,138 (2002).

⁴See Avista Corp., et al., 100 FERC ¶ 61,274 at P 3 (2002) (RTO West).

3. This order benefits customers because the SeTrans RTO will promote greater reliability and enhance competition in that portion of the Southeastern electric grid that it will operate.

I. Background

4. On October 16, 2000, in compliance with the Commission's directive in Order No. 2000, Southern filed with the Commission a petition for declaratory order that outlined its proposal for an RTO.⁵ In a March 14, 2001 order, the Commission denied Southern's petition, noting, among other things, that Southern's RTO proposal failed to fulfill the characteristics and functions of an RTO, and directed Southern to file a status report by May 14, 2001 that informed the Commission of the progress in forming an RTO for the Southeast. Southern Company Services, Inc., 94 FERC ¶ 61,271, reh'g denied, 95 FERC ¶ 61,172 and 61,190 (2001).

5. Also, on October 16, 2000, Southwest Power Pool, Inc. (SPP), in partnership with Entergy Services, Inc. (Entergy), proposed to establish an RTO and a for-profit transmission company operating within the umbrella of the RTO. In a March 28, 2001 order, the Commission found that it could not approve the scope and configuration of the SPP/Entergy RTO because SPP members failed to discuss the feasibility of a broader RTO with other entities. Southwest Power Pool, Inc., et al., 94 FERC ¶ 61,359 (2001). The Commission directed SPP and Entergy to engage in discussions with neighboring utilities concerning joining other RTOs, and to file, by May 25, 2001, a status report on the progress made in discussions to join an expanded RTO.

6. On July 12, 2001, the Commission issued orders on the status reports filed by Southern and SPP/Entergy.⁶ With regard to Southern, the Commission commended the progress made regarding RTO formation with the non-public utility transmission owners, but ultimately found that Southern's proposal did not meet the scope characteristic of Order No. 2000. With regard to SPP and Entergy, the Commission noted the lack of particularly intense or serious discussions with and efforts to accommodate other transmission owners, and concluded that, in order to meet the scope and configuration requirement of Order No. 2000, the RTO serving the region must be larger than that proposed by SPP and Entergy.

⁵Docket No. RT01-77-000.

⁶Southern Company Services, Inc., 96 FERC ¶ 61,064 (2001); Southwest Power Pool, et al., 96 FERC ¶ 61,062 (2001).

7. At the same time, the Commission initiated mediation involving transmission owners in the Southeast.⁷ In the mediation order, the Commission expressed a preference for large RTOs and directed Southern, SPP/Entergy, and the GridSouth Applicants⁸ to participate in the mediation to explore the formation of a single RTO in the Southeast, noting that "in order to successfully encompass the natural market for bulk power in the Southeast, it is necessary that the Southeastern transmission owners combine to form a single RTO." Ultimately though, the various transmission owners participating in the mediation had fundamental differences on certain important aspects of an RTO and the mediation reached an impasse.

8. Around this time Southern began discussions with Dalton Utilities, GTC, JEA, MEAG Power, Santee Cooper, SMEPA, and Tallahassee (the Original SeTrans Sponsors) to develop an RTO in the Southeast. These entities decided that an ISA concept was a way to accommodate the formation of an RTO and on November 20, 2001, these entities, joined by Entergy, informed the Commission in a status report that they had reached agreement on key principles of an RTO. Earlier this year, Cleco and Sam Rayburn joined their effort, further expanding the scope of the proposed RTO.⁹

II. Petition for Declaratory Order

9. On June 27, 2002, SeTrans Sponsors submitted for filing a petition for declaratory order concerning the proposed SeTrans RTO.¹⁰ SeTrans Sponsors request a declaratory order determining that: (i) the governance structure and business model of the proposed SeTrans RTO satisfies the independence criteria set forth in Order No. 2000; and (ii) the process by which the SeTrans ISA is to be chosen also satisfies those criteria.

10. SeTrans Sponsors state that the proposed SeTrans RTO is the product of collaboration and compromise among a diverse group of utilities including electric

⁷Regional Transmission Organizations, 96 FERC ¶ 61,066 (2001).

⁸Duke Energy Company, Carolina Power & Light Company, and South Carolina Electric and Gas Company.

⁹Attachment B to the Petition provides a map of the proposed geographic scope of the SeTrans RTO.

¹⁰On September 3, 2002, SMEPA withdrew its sponsorship of this Petition explaining that its withdrawal is a result of the large expense associated with being a sponsor of a proposed RTO.

cooperative, municipal, state-owned, and investor-owned utilities.¹¹ SeTrans Sponsors state that they conducted a collaborative process among themselves in negotiating and preparing the proposed RTO's organic documents and that all interested stakeholders then had opportunities to comment on drafts of the organic documents as a part of a broader collaborative process. This collaborative effort involved numerous and frequent meetings of the stakeholders and the Stakeholder Advisory Committee (SAC) to discuss various matters related to the SeTrans RTO.¹² Those organic documents included the System Administrator Retention Agreement (SARA), the pro forma Transmission Operating Agreement (TOA), the Market Design Protocol, the Operations Protocol, the Pricing Protocol, the Planning Protocol, and the Transmission Expansion Funding Protocol. The review process involved the public release of the proposals, followed by at least three open meetings to discuss each proposal. SeTrans Sponsors add that the agreements and protocols were significantly modified through the collaborative process.

11. SeTrans Sponsors propose that the SeTrans RTO will be governed by an Independent System Administrator (ISA) that will manage (but not own) the transmission facilities dedicated to the RTO. SeTrans Sponsors state that the SeTrans ISA will exhibit the four characteristics identified in Order No. 2000 as critical to an RTO and will be charged with the responsibility for the eight essential RTO functions, with the exception of the market monitoring role, which will be assumed by an independent organization. The SeTrans model facilitates (but does not require) the development of one or more Independent Transmission Companies (ITCs), which, if formed, would be delegated responsibility for certain limited RTO functions within its footprint.

12. SeTrans Sponsors also state that they support a common market design for the Southeast, including energy and ancillary services markets, a congestion management system based on Locational Marginal Pricing (LMP), tradeable Financial Transmission Rights (FTRs), and Participant Funding of certain new transmission facilities.

13. SeTrans Sponsors also explain that a number of concepts are critical to the voluntary participation of the Sponsors. They include the concept of participant funding, the ability to avoid cost shifting by utilizing a zonal rate structure through at least 2012,

¹¹SeTrans Sponsors state that Cleco, the Entergy Companies and Southern Companies are public utilities subject to the Commission's jurisdiction under the Federal Power Act (FPA) and that the other eight SeTrans Sponsors are generally not subject to the Commission's jurisdiction.

¹²Attachment C to the Petition provides a list of SeTrans meetings and other opportunities for interested parties to review the organic documents.

the ability to continue to honor grandfathered agreements, the ability to allocate FTRs to native load, the concept of installed capacity requirements, and the ability to exempt native load from the pricing provisions of the SeTrans ISA Open Access Transmission Tariff (OATT). SeTrans Sponsors state that a positive response from the Commission regarding these issues and concepts will encourage the SeTrans Sponsors to proceed further in the development of the SeTrans RTO.

14. SeTrans Sponsors claim that the proposed SeTrans RTO will be one of the largest RTOs in the nation. SeTrans Sponsors state that the cumulative transmission investment is approximately \$9.3 billion and their systems include approximately 54,000 miles of transmission lines rate 40 kV or higher; the cooperatively-owned and publicly-owned systems participating in the SeTrans effort represent transmission systems with over \$2.1 billion of investment and more than 11,000 miles of lines rated 40 kV and above. The SeTrans RTO would include systems in eight states, including Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas. SeTrans Sponsors add that they are proposing the development of a coordinated day-ahead and real-time energy market using a common market design model that could apply to the entire Southeast, regardless of the number of RTOs that may ultimately exist.

III. Notice of Filings and Responsive Pleadings

15. Notice of the Petition was published in the Federal Register, 67 Fed. Reg. 45,714 (2002), with interventions and protests due on or before July 29, 2002. On July 18, 2002, the Commission extended the time to intervene and protest until August 5, 2002. The parties shown on the attachment to this order filed interventions, protests, or comments. On September 4, 2002, SeTrans Sponsors and Southern separately filed responses to the protests and comments.

IV. Discussion

A. Procedural Matters

1. Motions to Intervene, Protests, Comments, and Answers

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the notices of intervention and timely, unopposed motions to intervene serve to make the intervenors parties to this proceeding. Given the early stage of the proceeding, its interest, and the absence of undue delay or prejudice, we find good cause to grant the untimely, unopposed motion to intervene of Tractebel Energy Marketing, Inc.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), generally prohibits answers to protests, unless otherwise ordered by the decisional authority. In this instance, we will accept the answers of SeTrans Sponsors and Southern because they provide information that clarify the issues and aid us in the decisional process.

2. Scope of the Commission Order

18. The purpose of SeTrans Sponsors' instant Petition is to seek approval and preliminary guidance only on certain issues related to the proposed formation of the SeTrans RTO. Indeed, SeTrans Sponsors are not requesting final approval for the SeTrans RTO, recognizing that details of their proposal have not been completed and submitted for filing.

19. Accordingly, this order makes a finding only on SeTrans Sponsors' proposed business model and ISA selection process, and generally the governance structure, and provides preliminary guidance on certain limited issues that have been raised in SeTrans Sponsors' Petition. As further details are submitted to the Commission for review, we will afford interested parties an opportunity to comment and we will address any such filings in subsequent orders.

B. Substantive Issues

1. Governance and Business Model

a. SeTrans Sponsors' Proposal

20. SeTrans Sponsors propose a governance and business model that is organized around the concept of an independent third party operator (the ISA), that will manage the transmission facilities over which it has control. SeTrans Sponsors state that the ISA will exhibit the four characteristics identified in Order No. 2000 as critical to an RTO and will be charged with the responsibility for eight essential RTO functions, with the exception of the market monitoring role which will be assumed by an independent market monitor (IMM). The ISA will enter into a number of contractual agreements with the participating transmission owners (Participating Owners), including the SARA and the TOA. Article 9 of the SARA details the organizational structure of the SeTrans ISA and specifies that the ISA's Board of Directors will hold regularly scheduled meetings. In addition, various protocols will govern how the ISA performs the RTO functions required by Order No. 2000. Finally, SeTrans Sponsors' proposed governance structure allows ITCs, when formed, to assume certain RTO functions and responsibilities, subject to the ISA's review and oversight.

21. As explained above, as a part of the collaborative process that led to this filing, SeTrans Sponsors state that they sought the advice of interested stakeholders and formed a Stakeholder Advisory Committee (SAC) that will participate in the selection of the ISA and IMM, in addition to providing ongoing advice to the ISA upon the creation of the SeTrans RTO. SeTrans Sponsors state that this collaborative process has yielded meaningful input that has resulted in a better RTO proposal.¹³

i. Independent System Administrator (ISA)

22. SeTrans Sponsors state that the ISA will be a legally-recognized business entity and a public utility regulated by the Commission under the FPA. SeTrans Sponsors assert that the ISA will be responsible for administering the single RTO-wide OATT and for exercising the RTO's section 205 rights (in accordance with the relevant provisions of the SARA and the TOAs) except that any Commission-approved ITC will have certain section 205, 16 U.S.C. § 824d (2000), rights with respect to rate design and incentive rates for that ITC's footprint. The ISA will also serve as the Security Coordinator for the SeTrans RTO's region and be responsible for operating the Day Two ancillary services and congestion management markets.¹⁴

23. Additionally, the ISA will be charged with performing the market administration and systems operations functions, such as day-ahead resource scheduling and real-time market operations. SeTrans Sponsors also propose to charge the ISA with open access and same-time information system (OASIS) administration, as well as the calculation of Available Transmission Capacity (ATC) and Total Transmission Capacity (TTC) for all facilities under its control, including the facilities of any ITC and of non-jurisdictional entities. The ISA will have ultimate planning authority and perform regional studies and planning. Further, the ISA will be responsible for the rate design for RTO-wide service and for service outside and through any ITC's footprint. Finally, SeTrans Sponsors propose to have the ISA serve as the point of contact for all interconnection requests by generators.

¹³All documents and presentations to the stakeholders have been posted on the SeTrans website (www.setransgrid.com).

¹⁴Under the "Day Two" market design, SeTrans Sponsors envision a broad, seamless market for energy and ancillary services, a congestion management system based on LMP, tradable FTRs, and Participant Funding of certain new transmission facilities.

24. SeTrans Sponsors state that the SeTrans ISA's authority and responsibilities will be set forth in the SARA, which is an agreement between the Participating Owners and the ISA. The SARA will also contain the terms of compensation for the SeTrans ISA. As proposed by SeTrans Sponsors, the SARA will obligate the SeTrans ISA to satisfy the requirements of Order No. 2000. In addition, the SARA will provide profit incentives to the SeTrans ISA for promoting cost effectiveness, reliability, and market efficiency.

25. The SARA will commit the ISA to an initial term of five years, with automatic renewal for five-year terms unless notice is given by the Participating Owners at least one year in advance. Further, the SARA allows for the early termination of the ISA's service for cause, including the failure to maintain independence. In the event that the ISA is terminated, the SARA contains provisions to ensure an orderly transition to the ISA's successor.¹⁵

26. The SeTrans ISA will also enter into a TOA with each of the Participating Owners, whereby each Participating Owner will transfer to the SeTrans ISA functional responsibility over all assets rated 40 kV or above that, in the judgment of the transmission owner, are necessary for the provision of transmission services in accordance with the Commission's policies and requirements and that would be potentially subject to an interconnection order under sections 210 and 212 of the FPA, 16 U.S.C. § 824j, k (2000).

27. SeTrans Sponsors state that they expect that virtually all of the collective transmission assets rated 40 kV or above of the SeTrans Sponsors will, in fact, be under the functional responsibility of the SeTrans ISA. Upon transfer of such functional responsibility to the SeTrans ISA, the parties will cooperate on an ongoing basis to ensure that the SeTrans ISA can carry out its obligations under Order No. 2000 in accordance with the SARA and the TOAs.

28. The TOA will also provide the opportunity for recovery through the SeTrans ISA's OATT of the Participating Owner's revenue requirements and will provide for the distribution of revenues from the SeTrans ISA's charges to the Participating Owners.

ii. Stakeholder Advisory Committee (SAC)

29. SeTrans Sponsors explain that the SAC, referred to above, will play an important role in the SeTrans RTO effort, as the SAC will assist in the selection of the SeTrans ISA, as well as providing ongoing advice to the SeTrans ISA. As constituted, the SAC

¹⁵Notice to change the ISA, either at the end of a five-year term, or for cause within a term, would be subject to the Commission's review and approval.

consists of twenty representatives of stakeholder interests, with two members being selected from each of the ten stakeholder groups.¹⁶ Market participants, including affiliates, may participate in more than one stakeholder group for which they qualify, but may not have more than one voting representative of the twenty that make up the SAC.

30. Each representative of the twenty that make up the SAC will have one vote on the SAC and the SAC will act upon the majority vote of a quorum of the representatives. SeTrans Sponsors will be allowed to participate in the SAC, but they are not allowed to have a majority vote on the SAC, they are not allowed to have sufficient voting power to veto a proposal, and they were not allowed to vote on the slate of the four ISA finalists.¹⁷ SeTrans Sponsors state that the SAC will also invite representatives of regulatory commissions and representatives of regional electric reliability councils to its meetings. Any of the invited representatives can participate in SAC proceedings on a non-voting basis.

31. Among its duties, the SAC will be responsible for providing ongoing advice to the management and board of directors of the SeTrans ISA on matters of concern. The SAC will also have the right to make presentations and written reports to the management of the ISA, and to present minority positions to the management of the ISA. Finally, the SAC will be responsible for selecting the IMM¹⁸ after the SeTrans RTO receives all of the necessary regulatory approvals.¹⁹

iii. Independent Transmission Companies (ITCs)

¹⁶The groups include the Investor-Owned Utilities; Power Marketers and Brokers; Generator Owners and Developers; Transmission Dependent Municipal Joint Action Agencies and Municipalities; Transmission Dependent Cooperatives; Transmission-Owning Cooperatives; Transmission-Owning Municipal Joint Action Agencies and Municipalities; State Government Agencies, Consumer Advocates and Environmental Interests; Industrial End Use Customers; and Transmission-Owning or Transmission Dependent Federal Utilities and State Owned Authorities.

¹⁷Petition at 24, 27-28.

¹⁸Unlike the process for selecting the SeTrans ISA, as discussed below, SeTrans Sponsors' propose that all SAC members would participate in selecting the IMM.

¹⁹Attachment K to the Petition provides a list of regulatory approvals required by the SeTrans Sponsors for participation in the SeTrans RTO.

32. SeTrans Sponsors state that once an ITC has been determined by the Commission to satisfy the independence requirements of Order No. 2000, the ITC may be delegated specified functions and responsibilities.²⁰ The ITC can perform planning for facilities within its footprint to reduce or alleviate congestion within the footprint. It can also perform system impact studies to evaluate requests for firm transmission service, perform interconnection studies for facilities requesting to interconnect to the ITC's transmission facilities, and have unilateral filing rights to propose rate design, incentive rates, or performance-based rates for facilities within the ITC's footprint under section 205 of the FPA.

33. SeTrans Sponsors assert that this arrangement will not affect the Commission's requirement for "one-stop shopping" for an RTO's customer. SeTrans Sponsors explain that a customer requesting transmission service that requires a system impact study or seeking a generator interconnection within an ITC's footprint will request such service from the SeTrans ISA and not the ITC. SeTrans Sponsors assert that while the ITC may then be assigned responsibility for performing the associated system impact study or generator interconnection study, it will do so at the direction of, and using standards established by, the SeTrans ISA.²¹

34. SeTrans Sponsors believe that this allocation of functions and responsibilities to the ITCs is consistent with the allocation approved in TRANSLink Transmission Company, LLC, 99 FERC ¶ 61,106 (2002) (TRANSLink), as well as other Commission orders approving the allocation of authority between an ITC and an RTO.²²

35. SeTrans Sponsors state that they intend the initial delegation of functions to an ITC to remain fixed for at least the first five years after commercial operation of the SeTrans RTO. Then, after that five-year period, SeTrans Sponsors believe that the initial division of authority should only be changed pursuant to a section 206, 16 U.S.C. § 824e (2000), complaint to the Commission.

iv. Independent Market Monitor (IMM)

²⁰The delegation of RTO functions to the ITCs is described in Section 6.1 of the SARA, Section 5.5 of the TOA, and in the Planning Protocol.

²¹See Commonwealth Edison Co., 90 FERC ¶ 61,192 at 61,618 (2000).

²²Id.; Avista Corp., 95 FERC ¶ 61,114 at 61,341, order on reh'g, 96 FERC ¶ 61,052 (2001); Bangor Hydro Electric Co., 96 FERC ¶ 61,063 at 61,262 (2001).

36. SeTrans Sponsors state that their RTO model contemplates that the market monitoring function will be performed by a market monitor corporation, as selected by the SAC.²³ The SeTrans ISA will contract with the IMM for monitoring services consistent with the following objectives, authority, and obligations. SeTrans Sponsors assert that the primary functions of the IMM will be:

- (i) to develop and report objective information regarding the structure and operations of the markets;
- (ii) to propose actions regarding efficiency improvements, correction of design flaws, market rule violations, and the identification of market power or anti-competitive conduct; and
- (iii) to conduct independent, objective monitoring, consistent with safe and reliable operations and minimal interference with competition.

37. The IMM would prepare and submit reports to the SeTrans ISA, the SAC, interested state agencies, and this Commission.

b. Intervenor's Comments

38. Many of the intervenors state that the SeTrans Sponsors could have resolved many of the issues raised in the protests if they had employed a better collaborative process with the stakeholders. Some argue that the concerns expressed were not adequately addressed through the collaborative process. Steel Producers contend, for example, that the SAC meetings were conducted on too fast a schedule and did not allow stakeholders sufficient time to analyze the various agreements and protocols. Further, Williams, for example, claims that the collaborative effort was largely an illusion and requests that the Commission remind the SeTrans Sponsors that a cavalier approach to the collaborative process will not be tolerated. The intervenors thus state they continue to have concerns with the governance and business model and claim that, under SeTrans Sponsors' proposed model, the SeTrans ISA would lack sufficient authority and independence from the Participating Owners.

²³Midwest Independent Transmission System Operator, Inc., 97 FERC ¶ 61,326 at 62,518-19 (2001) (accepting proposal to contract with independent entity to serve as the market monitor); see also Midwest Independent Transmission System Operator, Inc., 99 FERC ¶ 61,237 at 61,976 (2002) (ordering MISO to renegotiate its contract with its market monitor and specifying the market monitor's obligations).

39. Many of the intervenors argue that the SeTrans governance structure and business model would result in an RTO that would not be independent from the Participating Owners. Protestors such as Duke contend that the chief flaw of the governance and business model is that the ISA will not be independent from the Participating Owners. Duke and others indicate that SeTrans Sponsors have set forth numerous provisions in the SARA and the pro forma TOA that would allow the Participating Owners to directly or indirectly control the actions, operations, compensation, and even the continued existence of the ISA.

40. EPSA states that, if the ISA is beholden to the interests of the Participating Owners through various contractual obligations, then this arrangement will not meet the Commission's independence requirement. EPSA, Arkansas Electric, and others point to sections of the SARA, the TOA, and the various protocols where they claim that the ISA's authority has the potential to be undermined by the Participating Owners. For example, Arkansas Electric notes that under Section 6.1 of the SARA and Section 5.5 of the TOA, there is no requirement that an ITC consult with the SeTrans ISA prior to filing rate or rate design changes under section 205. Arkansas Electric contends that the lack of such consultation will prevent the ISA from reviewing the filing to determine whether there would be adverse impacts.

41. With respect to SeTrans Sponsors' proposed delegation of functions to ITCs, the City Council of New Orleans (New Orleans Council) states that, while it supports the overall structure of the SeTrans RTO, it takes specific objection to the proposal to delegate certain RTO functions to the ITCs. While the New Orleans Council recognizes that the Commission has found that an ITC model can bring significant benefits to the industry, it questions whether the ITC model is appropriate in the Southeast and fears that the delegation of functions to an ITC may adversely affect ratepayers.

42. Steel Producers, for example, state that the SARA vests the power to determine whether the ISA's term should be extended, and whether to terminate the ISA for cause, with the Participating Owners. Some intervenors contend that the Participating Owners can also control the ISA through the various compensation terms that are contained in the SARA and the TOA. Further, they argue that, under Section 3.8 of the TOA, the Participating Owners are given too much discretion in determining which transmission facilities would be designated as transmission assets, for which the ISA would have functional responsibility. Mississippi Delta also contends that the proposed model will not grant the ISA with sufficient authority over operations, pricing, and planning in order to assure access to the regional transmission grid on a fair and non-discriminatory basis.

43. Numerous intervenors also protest the hierarchy of documents as proposed by SeTrans Sponsors under Section 18.10 of the SARA and Section 18.2 of the pro forma TOA. The intervenors contend that under the proposal, the SeTrans RTO OATT will be subordinate to the SARA, the TOA, and the Agency Agreements in the event a conflict between the documents arise. Intervenors also argue that the OATT should be the primary document for governing the parties' responsibilities and that the SARA should control the TOA since the individual TOAs may vary.

44. Several intervenors suggest that SeTrans Sponsors should be directed to establish an alternate governance structure. Calpine, Duke, and EPSA all favor a governance structure based around an independent, permanent RTO Board of Directors. Duke suggests that such an RTO Board would oversee the ISA's operations, retain ultimate authority over RTO planning and expansion, and retain exclusive RTO tariff filing rights. In the alternative, Calpine states that if the Commission does not establish such an RTO Board, the only other suitable option would be to order wholesale revision of the prejudicial terms in the SARA, the TOA, and other governing documents.

45. Additionally, some protestors find fault with SeTrans Sponsors' market monitor proposal. Arkansas Electric states that the organic documents provide the IMM with only a passive role and with very limited authority, and further finds that the IMM should be required to file reports on a monthly, quarterly, and annual basis with the Commission. Municipal Entities agrees, finding that the market monitoring plan is "sketchy at best". Municipal Entities is also concerned with the IMM's limited authority, as described in Section 5.9 of the SARA. Steel Producers concurs, and also suggests that the SeTrans Sponsors, in conjunction with the SAC, should develop a separate market monitoring protocol that spells out the powers and authority of the IMM in detail.

c. SeTrans Sponsors' Response

46. SeTrans Sponsors contend that the collaborative process did, in fact, fully consider stakeholder comments and the proposed governance structure also reflects substantial compromise and negotiation among the transmission owners. SeTrans Sponsors add that many of the protestors' criticisms of the process stem from the fact that SeTrans Sponsors simply did not agree with all of the protestors' suggestions. With respect to concerns that the meeting schedule was moving too quickly, SeTrans Sponsors states that, although they recognize that the pace was quick, the pace was necessary as an unlimited amount of time was not available for this process.

47. As to the proposed SeTrans ISA, the SeTrans Sponsors dispute the protestors' contentions that the ISA would not have the necessary independence, as required by Order No. 2000. SeTrans Sponsors state that the selection criteria that will be used to select the ISA reflect, nearly verbatim, the independence criteria specified in Order No.

2000. Further, SeTrans Sponsors state that Section 5.4 of the SARA specifies that the ISA will have the sole authority to administer its OATT.

48. Contrary to the protests that SeTrans Sponsors included a number of provisions in the SARA and the TOA that would allow them to control the ISA, SeTrans Sponsors respond that, while certain essential elements of a relationship with the ISA have been specified in the SARA and the TOAs, such provisions are intended to assure that the ISA performs its service obligations while protecting the investments of the Participating Owners. SeTrans Sponsors add that when the final SARA and pro forma TOA are filed with the Commission, the protestors will have a further opportunity to comment before final Commission approval.

49. With regard to the designation of transmission assets, SeTrans Sponsors state that these concerns are premature as this is a purely theoretical issue at the present time. SeTrans Sponsors state that virtually all of the collective transmission assets rated at 40 kV or above will be under the functional responsibility of the ISA. Further, while they admit that a few transmission owners have expressed interest in reserving their transmission assets from the functional responsibility of the ISA, such owners would do so only because such facilities perform a purely localized function. In any event, SeTrans Sponsors state that the designation of facilities to be included in any RTO they develop is an issue between the Participating Owners and this Commission.

50. In response to the objection that an ITC be required to consult with the ISA prior to making a unilateral section 205 filing, SeTrans Sponsors state that are willing to place this consultation requirement in the Pricing Protocol if the Commission so requires. Responding to the protestors' concerns regarding the delegation of certain RTO functions to ITCs, SeTrans Sponsors state that the proposed delegation is fully consistent with Commission precedent addressing the ITC business model and approving the delegation of functions to ITCs. SeTrans Sponsors cite to decisions in TRANSLink and Alliance, where the Commission approved hybrid RTO structures where an ITC assumes certain RTO functions and operates within a larger RTO.²⁴

51. Further, SeTrans Sponsors defends its decision to include provisions that would limit the ability of the ISA to take back functions that have been delegated to the ITC.²⁵ SeTrans Sponsors state that such a limitation is necessary in order for an ITC to attract

²⁴Citing TRANSLink 99 FERC at 61,455, and Alliance Companies, et al., 99 FERC ¶ 61,105 at 61,430 (2002) (Alliance).

²⁵Section 6.1(b) of the SARA and Section 5.5(b) of the TOA.

investors and raise capital, and that, if the ISA could take back those functions, then it would be difficult for an ITC to attract investors. SeTrans Sponsors also recognize that its provisions limiting changes to functions delegated to an ITC is expressly subject to the Commission's ongoing SMD rulemaking in Docket No. RM01-12-000.

52. In defense of its proposed hierarchy of governing documents, SeTrans Sponsors state that the use of these provisions remain hypothetical as no party has identified any potential for conflict. SeTrans Sponsors state that the motivating factor for placing the TOAs above the SARA was to ensure that any individualization necessitated by a particular Participating Owner's circumstances (which are included in the TOA), would not be at risk of negation by an arguably pertinent provision elsewhere. Further, SeTrans Sponsors state that the individualization in the TOAs would, in all likelihood, pertain to rights of withdrawal or the particular details of the operation of some specific facilities. Therefore, SeTrans Sponsors argue that while the potential for TOAs to infringe on general rights established in the SARA or the OATT is limited, if such a does conflict arise, the various TOAs must govern.

53. SeTrans Sponsors also responds to the protestors' claims that its filing lacks detail as to the functions and authority of the market monitor. SeTrans Sponsors stress that the under Section 5.9(a)(iv) of the SARA, the market monitor will be required to perform numerous functions, including "such other functions as the FERC determines are in the public interest." With respect to claims that the market monitor may not be independent, SeTrans Sponsors state they have provided detailed descriptions in the draft SARA. Further, SeTrans Sponsors acknowledges that the SMD rulemaking will address market monitoring issues and therefore contend that a debate in this proceeding over the proper functions and detailed responsibilities of the SeTrans IMM is both premature and inappropriate.

d. Commission Response

54. In Order No. 2000, the Commission required that RTO governance be independent of market participants. This standard requires, among other things, that the RTO, its employees and non-stakeholder directors have no financial interests in any market participants, and that the RTO must have a decision-making process that is independent of control by any market participant or class of participants.

55. With regard to the claims that the SeTrans ISA would fail to be independent from the control of the participating transmission owners, the Commission finds that, consistent with the standards set forth in Order No. 2000, the SeTrans ISA would have sufficient independence. Section 5.1 of the draft SARA provides that the ISA and its affiliates will be independent of any market participants and the Participating Owners. Additionally,

Sections 5.2 through 5.12 of the draft SARA require that the ISA perform the functions and operations required by Order No. 2000. Further, the ISA, its employees, its Board of Directors, and its affiliates must be independent of, and not hold any financial interest, in any market participant or Participating Owner.

56. While some parties argue that the SARA would effectively permit the Participating Owners to remove the ISA before the end of a five year term, any such removal can only be made for cause.²⁶ Further, the SARA requires that any notice of termination of the ISA shall not be effective until it is reviewed and approved by the Commission.

57. We also note that even if an ISA were removed by the Participating Owners, they would not be able to control who the replacement ISA would be (since the Participating Owners would have no vote in choosing the slate of the final four ISA candidates). We believe that this factor would discourage the Participating Owners from attempting to remove an ISA for anything but good cause. We also note that only a super-majority vote (two-thirds vote) could remove the ISA and this would help to prevent a single Participating Owner or group of Participating Owners from inappropriately terminating the ISA.

58. We also take this opportunity to assure market participants that the Commission will ensure the independence of the ISA, and thus if there are concerns that the ISA is not acting independently, we encourage parties to apprise the Commission of that promptly. The ISA will be fully accountable to the Commission to act in an independent manner at all times.

59. Regarding the SARA, we agree with the intervenors' claims that the draft SARA, as submitted here, does not sufficiently define the role of the SAC. SeTrans Sponsors should add further detail with regard to the SAC's roles and responsibilities (particularly with regard to Section 9.3 of the SARA) when a section 205 filing of the SARA is made. Further, while the Sponsors' proposed SAC would permit market participants to participate in more than one stakeholder group, we note that, in the recent RTO governance structures acted on by this Commission, each market participant (including all of its affiliates) is only permitted to participate in a single stakeholder group and we find this arrangement to be more appropriate. SeTrans Sponsors' proposal would allow certain market participants to have too much influence in SAC discussions. The proposal should be modified accordingly.

²⁶Under Section 12.1 of the SARA, conditions that may give rise to termination are: (1) gross negligence with a materially adverse effect; (2) willful misconduct with a material adverse effect; (3) unwillingness to expand the RTO footprint; and (4) a bankruptcy-related event for the ISA.

60. With regard to the designation of transmission assets, we note that SeTrans Sponsors expects that at least 98 percent of their combined transmission facilities 40 kV or above will be subject to the ISA's functional control. The Sponsors also state that when the list of transmission assets are released, they do not expect any further disputes. We find that until an accounting of the various transmission assets is made, we will not speculate as to whether the Participating Owners will have undue discretion in designating transmission assets. In a future filing, SeTrans Sponsors should provide a complete listing of those transmission assets that will be subject to the functional control of the ISA, and those that will not. Additionally, SeTrans Sponsors will be required to provide a rationale for excluding any transmission assets providing wholesale transmission service from the functional control and responsibility of the ISA.²⁷

61. With regard to the delegation of function to ITCs, the Commission finds that SeTrans Sponsors' preliminary proposal is consistent with recent Commission orders recognizing that the ITC business model can bring significant benefits to the industry.²⁸ We also recognize that the SARA and the TOA require that any ITC operating within the SeTrans RTO must first obtain Commission approval before the ISA can delegate any RTO functions to the ITC.²⁹

62. We also accept SeTrans Sponsors' offer to include language in its Pricing Protocol that would require that an ITC consult with the ISA prior to making a unilateral section 205 filing. Such a requirement will allow the ISA to review any such filings in order to determine whether there would be adverse impacts.

63. With regard to the intervenors' concerns regarding the subordination of the OATT to the TOAs and the SARA, we will defer action on the TOAs and the SARA pending the submittal of the SeTrans OATT in the section 205 filing referred to elsewhere in this order. We understand that there may be certain, limited, instances when the general terms of the OATT may unreasonably infringe on the individualized terms of the TOA and cause unexpected adverse outcomes. SeTrans Sponsors is therefore directed to include in its OATT, the limited circumstances that pertain either to rights of withdrawal from the RTO or to other arrangements embodied in the TOA.

²⁷See RTO West, 100 FERC ¶ 61,274 at P 70.

²⁸See TRANSLink, 99 FERC at 61,445.

²⁹See Section 6.1 of the SARA and Section 5.5(a) of the TOA.

64. While SeTrans Sponsors also propose an ISA Board of Directors under Section 9.1 of the draft SARA, the Sponsors have provided little detail of this Board except noting that it will hold regularly scheduled meetings. When the SARA is filed, it should include details with respect to the ISA Board of Directors, including how its members will be chosen, as well as commitments concerning their independence from market participants. As to the suggestion that the SeTrans Sponsors should be directed to establish an alternative governance structure, such as a separate, independent RTO Board of Directors, we do not find that such action is warranted. In Order No. 2000, the Commission stated that "we will not limit the flexibility of proposed structures or forms of organizations for RTOs."³⁰ Accordingly, we find that the Sponsors' proposed ISA is not inconsistent with Order No. 2000.

65. With respect to SeTrans Sponsors' proposed IMM, the provisions contained in Section 5.9 of the draft SARA outline the functions and authority of the market monitor. Additionally, Section 5.9(a)(iv) will permit the addition of any market monitoring function that this Commission determines to be in the public interest. The Sponsors' proposed IMM appears to be generally consistent with other proposals the Commission has found acceptable to date on market monitoring. The Sponsors proposed IMM and the proposal to allow all SAC members to participate in the selection process of the IMM appear to be generally consistent with other RTO proposals the Commission has found acceptable.

66. SeTrans Sponsors' proposal of a governance structure that is centered around an ISA, supported by an IMM, satisfies the independence standard set forth in Order No. 2000. We recognize, however, that the SARA, the TOA, the OATT, and other protocols still need to be filed in final form, and so we do not rule on specific provisions in these documents at this time. We also recognize that intervenors have raised numerous concerns with regard to these documents and we advise SeTrans Sponsors to use the stakeholder process and collaborative efforts before refiling any documents. In sum, when drafting the final versions of the SARA, the TOA, and the other protocols to be filed with us, we expect SeTrans Sponsors and the SeTrans ISA to consider and address any remaining stakeholder concerns prior to their filing.

2. Selection of the SeTrans ISA

67. SeTrans Sponsors request in its Petition that the Commission rule on whether the process by which the SeTrans ISA is to be chosen satisfies the criteria set forth in Order No. 2000.

³⁰Order No. 2000 at 31,036.

a. SeTrans Sponsors' ISA Selection Process

68. SeTrans Sponsors state that its current selection process will result in the selection of a system administrator that is truly independent. SeTrans Sponsors state that it has charged the SAC with identifying four qualified candidates for the position of the system administrator, from which the SeTrans Sponsors would then choose one to serve as the SeTrans ISA.

69. SeTrans Sponsors provided the SAC with four minimum requirements for identifying the SeTrans ISA candidates. First, the ISA could not be a market participant. Second, the ISA, its employees, and its directors would be prohibited from maintaining a financial interest in any market participant. Third, the ISA could not own transmission, generation, or distribution facilities in the regions relevant to the RTO. Fourth, the ISA must demonstrate that it is capable of operating the transmission system. Further, the SeTrans Sponsors emphasized that the ISA candidates should: (i) establish a special advisory role for the State Public Service Commissions outside the context of the SAC; (ii) have a Board of Directors that is easily accessible; and (iii) employ experienced and capable operators.

70. On February 15, 2002, the SAC issued a request for qualifications and received timely responses from nine potential candidates. In early April 2002, the SAC entertained presentations from each of the candidates, and on April 25, 2002, the SAC narrowed the field to four candidates.³¹ SeTrans Sponsors state that they will begin to determine which of the two candidates should be selected as the SeTrans ISA. The candidates will be required to provide more detailed information, and the SeTrans Sponsors anticipate selecting the SeTrans ISA by the Fall of 2002.

71. SeTrans Sponsors contend that this ISA selection process is consistent with Commission precedent, explaining that the SAC was provided with a great amount of discretion and influence in selecting the finalists from the slate of candidates. SeTrans Sponsors will select the ISA from the finalists chosen by the SAC. The Sponsors also cite to the recent TRANSLink decision, where the Commission supported an approach which provided the stakeholders with direct influence on the identification of candidates

³¹In early June 2002, two of the four finalists announced that they were withdrawing their applications from further consideration. The two remaining ISA candidates are ESB International, Ltd and Accenture; and The Marketplace Company, LECG and Nord Pool Consulting.

from among whom the final choice would be selected by the participating owners.³² Thus, considering the level of the participation by the SAC in the ISA selection process, SeTrans Sponsors argue that its ISA selection process meets the Commission's test for independence of the SeTrans ISA.

b. Intervenor's Comments

72. NRG and Dominion Virginia protest the ISA selection process, arguing that the process was influenced by one class of market participants, the transmission owners. NRG finds that such an arrangement would violate the independence requirements of Order No. 2000. NRG also contends that the SAC is heavily weighted with transmission owners and that the SAC was under extreme time pressure to provide the SeTrans Sponsors with a final slate of qualified ISA candidates. As a result, NRG contends that there was a negligible amount of stakeholder input to the selection of candidates for the SeTrans ISA, and that such a result violates the independence requirements of Order No. 2000.

73. Conversely, the New Orleans Council finds that SeTrans' ISA selection process is perhaps the best structure that has been offered for a Southeastern RTO to date. The New Orleans Council continues that the proposal for a third-party, independent operator chosen by the SeTrans Sponsors from a list created by the SAC has the greatest potential for securing a truly independent, third-party operator of the transmission grid. The Georgia Commission likewise finds no objection with the selection process, and the Texas Commission finds that the ISA model may result in a strongly independent governing structure for the RTO.

c. SeTrans Sponsors' Response

74. SeTrans Sponsors state that criticism of its ISA selection process has been sparse and the lack of criticism highlights the fact that none of the protestors argue that the ISA candidates are not independent from the market participants – the real test of Order No. 2000. While SeTrans Sponsors recognize that there was some criticism, it states that many intervenors, including most of the regulatory bodies, are satisfied with the selection process and the remaining ISA candidates. SeTrans states that, given such support, the Commission is well-advised to approve the ISA selection process.

d. Commission Response

³²See TRANSLink, 99 FERC at 61,461.

75. The Commission finds that SeTrans Sponsors' ISA selection process will result in the selection of an ISA that is independent, as required by Order No. 2000. SeTrans Sponsors' process invested the SAC with the ultimate responsibility of choosing the slate of ISA candidates that would be presented to the Sponsors for a final selection. We find that the selection process allowed the SAC great discretion in selecting the candidates, and that this process remained independent of control by any market participant or class of participants.

76. NRG's argument that the ISA selection process violates the independence requirement is without merit. The transmission owners did not dominate, and were not overly represented on, the SAC so as to constitute a class of participants that could threaten the proposed ISA's independence. We further note that, contrary to NRG's assertions, the representatives of individual SeTrans Sponsors serving on the SAC did not participate in the vote to select the slate of candidates.

77. We also find that the SAC's minimum requirements for ISA independence were appropriate, i.e., that the ISA not be a market participant; that the ISA, its employees and directors cannot have a financial interest in any market participant; and that the ISA will not own any electric facilities in regions of relevance to the RTO.³³ The Commission therefore finds that SeTrans Sponsors' ISA selection process is reasonable, consistent with Commission precedent, and should result in the selection of an independent system administrator.

3. SeTrans Sponsors's Supporting Organic Documents

78. SeTrans Sponsors' Petition also seeks to show that its draft protocols will support proposed the governance structure and business model, and will work to satisfy the requirements of Order No. 2000. SeTrans Sponsors' Petition contained five draft protocols covering Market Design, Operations, Pricing, Planning, and Transmission Expansion Funding. Within these protocols, SeTrans Sponsors request Commission guidance on various issues that they consider to be critical.

79. Our review of SeTrans Sponsors' draft protocols indicates that the Sponsors have made a great deal of progress to date in developing the final protocols that they will need to file under section 205. SeTrans Sponsors request that the Commission provide them

³³On this last point, however, we ask that at the time of its section 205 RTO filing, SeTrans Sponsors should clarify that neither the ISA, its employees or directors will own or have financial interest in companies that provide inputs (e.g., natural gas or coal) to the generation of electricity in the region.

with preliminary guidance on certain issues in order that they may continue with the development of their RTO. At this stage, however, we will limit our discussion to those matters which SeTrans Sponsors have identified as critical issues in the further development of the SeTrans RTO.

80. It is equally premature to address many of the issues raised by intervenors at this time and in this forum. The draft protocols are works in progress and we expect that SeTrans Sponsors and the stakeholders will address the remaining issues through a collaborative process prior to making filings under sections 203 and 205. When these filings are made, interested parties will be free to file their comments and objections in that proceeding.

a. Market Design Protocol

SeTrans Sponsors' Proposal

81. SeTrans Sponsors state that their market design supports many of the features proposed in the SMD rulemaking proceeding in Docket No. RM01-12-000. The Sponsors also recognize that more detailed market design rules will need to be developed working with the SAC and all stakeholders. Among the features of the Market Design Protocol are the following; the ISA will operate a regional two-settlement market consisting of both day-ahead and real-time settlement; and the clearing prices in both the day-ahead and real-time markets will be visible to all market participants based on the LMP of energy at each location and reflect the impacts of congestion. SeTrans Sponsors state that markets for ancillary services such as Operating Reserves and Regulation may be developed as the real-time market matures. In the case of network service customers (including the native load of a transmission owner), FTRs from specific network resources to load will be allocated based on the historical use of the transmission system. SeTrans Sponsors state that holders of existing physical transmission rights under grandfathered agreements have the option to convert those rights to equivalent FTRs. SeTrans Sponsors state that any remaining FTRs would be auctioned off periodically to facilitate a secondary market in FTRs.

82. The Market Design Protocol would also institute a long-term planning reserve requirement, known as installed capacity (ICAP), applicable to all Load Serving Entities (LSEs). LSEs will be required to make a subset of their ICAP resources available to the

SeTrans ISA on a day-ahead basis. This subset of resources is referred to as the Monthly Available Capacity (MAC) requirement, and will be based upon the forecasted monthly peak load plus planning reserves.

Intervenor's Comments

83. With regard to the Market Design Protocol, many intervenors like Dominion Virginia share the concern that the SeTrans' proposal may conflict, or somehow inhibit, the move to a standard market design. Calpine states that the scope and commitment to implement the Market Design Protocol is too limited and that the Commission should condition approval of the SeTrans RTO proposal based on the full adoption of the Commission's Final Rule in Docket No. RM01-12-000.

84. A number of intervenors have raised issues that the proposed Market Design Protocol would give preferential treatment to grandfathered agreements (GFAs). In addition the intervenors suspect that there may be many GFAs and note that SeTrans Sponsors have not provided any accounting of the number or identity of the anticipated GFAs.

85. Also with regard to GFAs, Duke argues that holders of existing physical transmission rights (PTRs) under such GFAs should be required to convert those contracts to financially equivalent FTRs. Furthermore, without any incentives, Duke does not believe that PTR holders have any reason to convert these rights to FTRs. As a result, Duke claims that holders of GFAs that do not convert their rights to FTRs will actually be withholding transmission capability and FTRs from the market.

86. Some intervenors also contend that the Market Design Protocol must recognize that LSEs hold FTRs for the sole benefit of their native load customers. Specifically, Steel Producers argue that if an LSE puts its initially allocated FTRs on the market, then its native load customers should have the right to the revenues derived from the auction.

87. The Louisiana Commission believes that SeTrans Sponsors' proposal on FTRs should be rejected because the Market Design Protocol is unclear regarding the distribution of FTRs. Calpine asserts that FTRs should be awarded to the highest bidder rather than allocated to native load first. Williams proposes a full auction after a transition period of three years. EPSA supports allocation of FTRs to the existing users of the system but wants the existing users to make the FTRs immediately available for auction in the secondary market. The Arkansas Commission agrees with the FTR allocation proposed by SeTrans Sponsors.

88. Municipal Entities contends that the proposed ICAP requirement should be clarified. They state that although they do not oppose the establishment of an ICAP requirement in principle, it is essential that the SeTrans ICAP requirement be established in a manner that is non-discriminatory in the sense of having differential impacts on LSEs of varying size. Municipal Entities also cites concern with the fact that existing reserve sharing arrangements in the Southeast may be discriminatory and that there should be an open window period to allow other SeTrans entities to join in the reserve sharing arrangement. Finally Municipal Entities states that an ICAP requirement must have an open ICAP market with transparent pricing.

89. Other intervenors (such as Duke and Calpine) argue that the ICAP requirement should be a uniform minimum throughout SeTrans, otherwise there may be LSEs that, due to grandfathering, state jurisdictional requirements or other legal or contractual requirements would have lesser ICAP requirements and would get a free ride on the backs of those that have to meet the RTO's minimum reliability criteria. Calpine adds that SeTrans Sponsors' proposed Market Design Protocol's provisions for reserve sharing are unclear and may be discriminatory.

SeTrans Sponsors' Response

90. SeTrans Sponsors state that, in their Petition, they acknowledged that the Final Rule issued in Docket No. RM01-12-000 may affect their proposal. SeTrans Sponsors also assert that the basic market design structure in their petition is fairly consistent with the SMD NOPR and that both envision a large seamless regional market, LMP to manage congestion, FTRs to hedge exposure to congestion costs, regionally coordinated planning, bid-based markets and participant funded expansions.

91. SeTrans Sponsors respond that the criticisms of the ICAP provisions of the Market Design Protocol are unrelated to the independence of the SeTrans ISA and should be tabled until the final protocol is submitted by SeTrans Sponsors following the Final Rule in Docket No. RM01-12-000. They add that their version of the Market Design Protocol was prepared and tendered before the SMD NOPR was issued and that there will be a need to consider modifications to the protocol as a result of the Final Rule.

Commission's Response

92. We agree with SeTrans Sponsors that the basic market design structure in their petition is consistent in many cases with the SMD NOPR; both envision a large seamless regional market, LMP to manage congestion, FTRs to hedge exposure to congestion costs, regionally coordinated planning, and bid-based markets. Up to this point, we believe that the SeTrans Sponsors appear to be headed in the right direction with their

development of these concepts and we are encouraged by the progress that has been made thus far. And the fact that intervenors may file comments at a later date on the specifics of the final version of these organic documents affords them with protection that SeTrans' Market Design Protocol will be consistent with the principles and objectives of Commission's SMD rulemaking proceeding.

93. A number of intervenors have raised issues that the proposed Market Design Protocol would give preferential treatment to grandfathered agreements (GFAs). In addition the intervenors suspect that there may be many GFAs and note that SeTrans Sponsors have not provided any accounting of the number or identity of the anticipated GFAs. We therefore direct the SeTrans ISA to provide a complete list of such agreements in the future section 205 filing.³⁴ In the SMD NOPR we also proposed to generally preserve GFAs, and thus, we see nothing that, on a conceptual level, that is inconsistent in SeTrans' proposal here.

94. A number of commenters also raised issues with SeTrans Sponsors' proposal on FTRs. The Commission addressed Duke's concern that holders of PTRs be required to convert those contracts to financially equivalent FTRs in RTO West.³⁵ The Commission found that the Applicant's proposal for voluntary conversion was reasonable because it allowed existing contract customers to choose to either maintain the benefits of their pre-existing contracts or convert to a more flexible RTO West transmission service. We did not require mandatory conversion in RTO West and will not do so here. The Louisiana Commission believes that SeTrans Sponsors' proposed FTR distribution should be rejected because the Market Design Protocol is unclear regarding the distribution of FTRs. A number of commenters proposed alternative ways to allocate FTRs initially and how to allocate them after a transition period. The SMD NOPR proposes that initial allocation of Congestion Revenue Rights (CRRs) should be based on historical usage, including existing contractual arrangements.³⁶ In this filing, SeTrans Sponsors have proposed to allocate financial rights based on historical usage. While SeTrans Sponsors have not spelled out every detail in this regard, their approach on initial allocation of financial rights appears to generally conform with the Commission's approach on this issue. We make no further findings regarding SeTrans' ICAP proposal because it is not sufficiently developed at this time. We would urge SeTrans Sponsors to work with the

³⁴The list should include the transmission capacity and FTRs that the current market design proposes to exclude from the SeTrans ISA OATT.

³⁵RTO West, 100 FERC ¶ 61,274 at P 103.

³⁶SMD NOPR at P 376.

stakeholders to develop these details and try and resolve issues related to the allocation of financial rights prior to filing their Market Design Protocol under section 205.

b. Operations Protocol

95. SeTrans Sponsors state that among the responsibilities of the SeTrans ISA, it will: administer a single RTO-wide OATT and exercise functional responsibility over the transmission system; review and approve all requests for transmission service as sole transmission provider; calculate TTC and ATC; administer the SeTrans OASIS; and be responsible for maintaining the short term security and reliability of the transmission system.

96. SeTrans Sponsors assert that the Operations Protocol defines specific responsibilities for each operating entity within the SeTrans RTO. The SeTrans ISA would be responsible for: security coordinator functions; scheduling functions; administration of OASIS; transmission services; emergency operations actions; and generation outage coordination. Under the direction and control of the ISA, the various control areas, Generation Control Centers, and LSEs will perform certain operational responsibilities.

97. Although several intervenors raise concerns with the proposed Operations Protocol, we will not address these concerns, or the merits of the Protocol, because we have insufficient information at this time to resolve these issues.

c. Pricing Protocol

SeTrans Sponsors' Proposal

98. SeTrans Sponsors state that the draft Pricing Protocol contains a pricing structure that combines non-pancaked Zonal Rates applicable to load within the RTO and a single regional rate applicable to load outside the RTO (a Regional (Drive)-Through and (Drive)-Out Rate (RTOR)). SeTrans Sponsors state that the Pricing Protocol will serve as the basis for transmission access pricing in the SeTrans RTO until at least December 31, 2012. The RTOR applies to all transmission transactions that exit or go through the SeTrans RTO to serve load outside the SeTrans RTO. SeTrans states that the actual rate assessed will be based on the net lost revenues of the participating owners due to elimination of pancaking. SeTrans asserts that the RTOR will be at least equal to the weighted average RTO-wide cost of transmission facilities but will not exceed the highest zonal rate.

99. Additionally, the Pricing Protocol will require that all customers of the transmission system, with certain exceptions, be subject to the rates, terms, and conditions of the SeTrans OATT. Existing service under grandfathered agreements that are not converted to service under the OATT, bundled retail load of Participating Owners that are vertically integrated, and Participating Owners that have tax-exempt financing or tax-exempt status will not be charged the applicable zonal rate for transmission under the SeTrans ISA OATT. Such Participating Owners will instead reflect the revenue from native load, including bundled retail load, in developing their revenue requirements for their zonal rate or credit these revenues while excluding those loads in developing the revenue requirement for the applicable zonal rate.

100. SeTrans Sponsors state that the Pricing Protocol also describes an administrative fee that will be levied by the SeTrans ISA on all transmission transactions, including transactions by Participating Owners who procure transmission service for native load and grandfathered agreements. The administrative fee will include the cost of service for the SeTrans ISA, a management fee, and amortization of the Participating Owners' eligible start-up cost. The administrative fee will be projected annually with an annual true up.

Intervenors' Comments

101. Several intervenors find it objectionable that the Pricing Protocol would limit the ability of the ISA to seek rate structure changes through December 31, 2012. Intervenors claim that any limitation on the RTO's authority to propose changes to the rates, terms, and conditions of the SeTrans OATT could hold the ISA hostage to the potentially conflicting actions of various state commissions and the Participating Owners. Other intervenors contend that the SeTrans Sponsors are proposing to leave the zonal pricing structure in place for ten years while giving no indication that they will begin to explore the possibility of developing a single postage stamp rate for the RTO. Steel Producers contends that the SeTrans Sponsors should begin to examine whether moving from a zonal structure to a single rate structure would provide substantial overall benefits to consumers within the RTO.

102. Some intervenors also complain that the procedures explaining the determination of the RTOR are insufficient to allow an informed judgement of the proposal, and argue that additional clarity is needed. Others state that the use of RTOR revenues to reduce cost shifts or to make up revenues from lost pancaking simply shifts the burden of pancaking from some parties to others. AMEA finds that to the extent that RTOR revenues are used to offset the loss of revenues by transmission owners, RTOR revenues should also be used to compensate parties that experience increased costs under the RTO.

SeTrans Sponsors' Response

103. SeTrans Sponsors again state that the Pricing Protocol sets out the basic framework for pricing transmission service and does not include specific rates, but puts forth certain principles to be used by the ISA in developing transmission rates for service in the SeTrans RTO.

104. SeTrans Sponsors state that a move to a single postage stamp rate will cause cost shifting within the SeTrans RTO and that many of the non-jurisdictional utilities that are Sponsors will see their benefits reduced or eliminated and may not participate as a result. If those utilities dropped out, the other utilities in turn would also find themselves in a similar position. SeTrans Sponsors add that the comparison to other regions is not relevant to the Southeast because in other regions there may not be significant cost differences among the utilities. SeTrans Sponsors assert that the highest-cost transmission provider in the proposed SeTrans RTO has a rate that is double that of the lowest-cost provider and that the cost shifting would be significant. SeTrans Sponsors state that they proposed to hold the zonal rate structure in place for several reasons, including their belief that the cost difference would be reduced by 2012 and the Integrated Transmission System Agreements (ITSAs) between Georgia Power and Dalton, GTC and MEAG have a primary term that runs until 2012.

Commission's Response

105. With respect to SeTrans Sponsors' proposed Pricing Protocol, SeTrans Sponsors request that the Commission provide a response on: (1) their proposal to employ a zonal rate structure until 2012; (2) their methodology in determining a regional RTOR rate; (3) their treatment of grandfathered agreements; and (4) their proposal that rates for the transmission component of bundled retail load of vertically integrated participating owners will continue to be set by the state regulatory commissions and will not be charged the applicable zonal rate under the SeTrans ISA OATT. SeTrans Sponsors explain that they are submitting a draft version of their proposed Pricing Protocol in order to obtain a Commission response on elements that are critical to them. SeTrans Sponsors further explain that they will be submitting their completed Pricing Protocol when they submit a complete RTO application pursuant to section 205. As such, we will limit our discussion to those elements that SeTrans Sponsors have stated are critical to the continued development of the SeTrans RTO. Further, the Commission has addressed these topics in the SMD NOPR and we look at this filing as both informing and being informed by the proposed rule.

106. Several intervenors find it objectionable that the Pricing Protocol would limit the ability of the ISA to seek rate structure changes through December 31, 2012, which is

approximately eight years after the SeTrans RTO expects to begin operations. While the SMD NOPR contemplates a shorter transition period for conversion to service from an independent transmission provider under a single rate design,³⁷ we find that the proposed transition period is developed in a manner that will minimize cost shifts and loss of revenues, and is intended to foster participation in SeTrans RTO by market participants and to accommodate the unique contractual arrangements between public power entities and those entities subject to the Commission's jurisdiction within the SeTrans footprint. The Commission therefore finds that SeTrans Sponsors' proposal to limit rate structure changes through 2012 is reasonable in this context, which is similar to what we recently approved in RTO West.³⁸

107. In the SMD NOPR, the Commission proposed to eliminate rate pancaking for inter-regional transfers and proposed two mechanisms that would recognize the import/export quantities of inter-regional transfers in establishing the revenue requirement to be covered through the access charge. The Commission stated that it sought comment on two approaches that could be used.³⁹ At such time as the SeTrans Sponsors file their detailed and final Pricing Protocol under section 205, we would expect SeTrans Sponsors' proposed pricing methodology for inter-regional transfers would be consistent with the principles and objectives of our Final Rule, if effective by then.

108. SeTrans Sponsors propose to exclude the bundled retail load of vertically integrated Participating Owners from being charged the applicable zonal rate under the SeTrans ISA OATT. When a vertically integrated utility joins a regional organization such as an ISO or an RTO, the Commission has required that the utility execute a service agreement under the appropriate OATT. In GridSouth, the Commission directed the vertically integrated utilities to execute a service agreement under the GridSouth transmission tariff.⁴⁰ With respect to whether the RTO transmission charge should be applied to the bundled retail load, the Commission has permitted utilities to pay the transmission portion of the bundled retail rate, but required that the service agreement explicitly state the rate that is charged. Accordingly, we expect the SeTrans RTO to have similar arrangements in place. Finally, we provided guidance previously in this order on the treatment of grandfathered agreements.

³⁷SMD NOPR at P 167-78.

³⁸See also RTO West, 100 FERC ¶ 61,274 at P 133.

³⁹The two approaches are explained in detail in the SMD NOPR at P 179-89.

⁴⁰Carolina Power & Light Co., et al., 94 FERC ¶ 61,273 at 61,999 (2001) (GridSouth).

d. Planning Protocol

SeTrans Sponsors' Proposal

109. Under the draft Planning Protocol, the SeTrans ISA will be responsible for developing (through a regional planning process) and approving the annual transmission expansion plan, as well as directing or arranging necessary transmission expansions, that will enable it to provide efficient and reliable transmission service.

110. Specifically, the regional planning process, as provided for under the Planning Protocol, gives the SeTrans ISA the responsibility of issuing an annual transmission plan, subject to review and approval by state public service commissions or other government organizations with the authority to approve such projects. The Protocol requires that planning and expansion of the transmission system will incorporate good utility practices without regard to ownership of the generation, distribution, or transmission facilities.

111. Additionally, the Planning Protocol provides that the SeTrans ISA will be required to provide stakeholders with access to the annual draft transmission expansion plans via the OASIS postings. The stakeholders would then be given the opportunity to submit information and concerns regarding the impact of any transmission planning options.

112. Transmission system expansion will be funded by either the entities that receive a benefit from the proposed expansion (Participant Funded) or through the applicable zonal rate(s) (Base Plan Funded), as discussed more fully below. With regard to what investments are considered to be the Base Plan Funded investments, SeTrans Sponsors state that such investments will cover investments to maintain NERC standards of reliability; and any investments that would change out, replace, or repair transmission facilities, where such investments are designed primarily to restore or maintain the existing capability of the system. Examples of what investments are considered to be Participant Funded investments include projects to add, integrate, or interconnect any new generation resources to the transmission system; investments to provide transmission reservations for point-to-point service; investments to reduce congestion within the SeTrans RTO (which are designed to reduce the price of power for certain loads and/or increase the locational marginal price received by certain generators); and investments to increase throughput across, out of, or into the SeTrans system.

113. In the case of Base Plan Funded transmission expansions that are added to, or interconnect with, existing facilities of a Participating Owner, the Planning Protocol proposes that the Participating Owner would have the right to construct and own such facilities. If the Participating Owner declines to construct the new transmission facilities,

the Planning Protocol proposes that the SeTrans ISA will identify third parties to construct the facilities using a bid process within the Planning Protocol.

Intervenors' Comments

114. Numerous intervenors believe that the Planning Protocol, as proposed, does not provide the ISA with sufficient authority over the planning of the transmission system. Intervenors contend that the Protocol currently would allow the Participating Owners to exert too much control over the regional planning process in violation of Order No. 2000. AEC argues that under this Protocol, the Participating Owners will do the actual planning within their area except with regard to new transmission service requests, and that the ISA would have no authority for transmission planning for either new or modified facilities related to load growth.

115. Finally, several intervenors argue that the Participating Owners should not have the right of first refusal on Base Plan Funded additions to interconnect with existing facilities. These intervenors claim that such a provisions will allow the Participating Owners to cherry pick the projects that they choose to construct.

SeTrans Sponsors' Response

116. SeTrans Sponsors state that the ISA will have final authority and responsibility for the SeTrans regional planning process. SeTrans Sponsors assert that the ISA will consider all options and identify expansions that are critically needed. According to SeTrans Sponsors, the ISA will also be responsible for identifying expansion projects. The SeTrans Sponsors state that the SeTrans ISA will meet its system planning responsibilities through the development of a coordinated annual transmission expansion plan and that the ISA will have primary responsibility for all transmission system studies.

Commission's Response

117. SeTrans Sponsors' proposed Planning Protocol provides Participating Owners with the right of first refusal to construct and own new transmission facilities when those facilities are added to or interconnected to the Participating Owners' existing transmission

system.⁴¹ We believe these provisions have not to date been explained or justified, and we direct SeTrans Sponsors to explain why such provisions are necessary. The presence of multiple transmission developers would lower costs to customers. We note that states retain siting jurisdiction and we intend that issues of right of first refusal would not endanger public power private use requirements. We seek further clarification of this feature, including whether it implicates public power private use requirements.

118. SeTrans Sponsors' draft Planning Protocol provides that the SeTrans ISA will give consideration to all market perspectives, including demand side options, and identify expansions that are critically needed. The draft Protocol also states that the SeTrans ISA will be responsible for identifying expansion projects to enhance trading opportunities, mitigate high congestion costs, and alleviate congestion that may enhance generator market power. The draft Protocol provides that the SeTrans ISA will achieve these planning process principles through the development of a coordinated annual transmission expansion plan. The draft Protocol also provides that the ISA will have primary responsibility for all transmission system studies.

119. We endorse these roles for the ISA and believe that these roles, as developed in the draft Protocol to this point, indicate that the ISA will not be a mere aggregator of the planning responsibilities. In Order No. 2000, we determined that the RTO must be the coordinator and final decisional authority that approves the plans or requires that changes be made.⁴² We will expect the SeTrans ISA to be similarly empowered. In addition, when SeTrans submits its final Planning Protocol pursuant to section 205, we would expect that the Protocol will take the best practices and guidance from prior Commission orders on the regional planning process, as well as guidance from the SMD NOPR, into account.⁴³

e. Transmission Expansion Funding Protocol

SeTrans Sponsors' Proposal

120. SeTrans Sponsors' Transmission Expansion Funding Protocol provides a method for funding new transmission investment. Central to this Protocol, is that transmission

⁴¹Section 2.4 of the draft Planning Protocol. See also Section 5.4 of the draft pro forma TOA.

⁴²Order No. 2000 at 31,086. See TRANSLink, 99 FERC at 61,472. See also, RTO West, 100 FERC ¶ 61,274 at P 226-27.

⁴³See also SMD NOPR at P 335-50.

investments will be classified as either Base Plan Funded or Participant Funded. Any Base Plan Funded investment made by a Participating Owner will be included in the rate of the applicable Pricing Zone, unless the SeTrans ISA makes a determination that the Base Plan Funded investment should be shared among multiple price zones.

121. In the draft Protocol, SeTrans Sponsors state that Base Plan Funded investments include investments that are required to serve forecasted load reliably from existing resources. Examples of such investments would be those that are needed to maintain NERC standards of reliability at forecasted load levels in each pricing zone from existing firm resources, including investments that are required to serve load growth reliably. Base Plan Funded investments would also include investments to change out, replace, or repair transmission facilities, where such investments are primarily designed to restore or maintain the existing capability of the system.

122. As to Participant Funded investments, examples include transmission investments to add, integrate or interconnect new generation resources to the transmission system, as well as investments to increase throughput across, out of or into the SeTrans system. SeTrans Sponsors state that Participant Funded investments are extremely important in the Southeast, where the growth in generation exceeds the regional load. As a result, Sponsors claim that if all the transmission upgrades needed to add new generation to the grid is "rolled in," these new generators will not see an accurate price signal as to the costs associated with their locational decisions. SeTrans Sponsors believes that Participant Funding would instead send an accurate price signal and act as a market surrogate for the integrated planning traditionally employed by utilities.

123. SeTrans Sponsors state that the Participant Funded investment will not affect the funding party's SeTrans OATT rates, nor will that party receive a credit against its SeTrans OATT rates (either a Zonal Rate or the RTOR). In return for their investment, parties who fund the cost of such transmission expansion projects would receive net incremental FTRs in proportion to their investment. In general, SeTrans Sponsors state that the FTRs will have a term of 30 years and that the funding party can hold or sell the FTRs for any portion of their term. Additionally, the funding party will be responsible for the operation and maintenance of the facility during the term of the FTRs, as well providing for capital replacement costs for the facility during the term of the FTRs.

Intervenors' Comments

124. Many intervenors, including the various public service commissions, support the concept of Participant Funding, finding that "rolled-in" transmission pricing does not create efficient pricing signals for siting new generation. The Mississippi Commission states that the only way to send good price signals for siting is through incremental

pricing, and that Participant Funding accomplishes this. The Mississippi Commission continues that simple fairness dictates that generators be required to pay for the expansion that they cause and benefit from, and that native load ratepayers should not be saddled with such costs.

125. The Arkansas Commission also lauds the benefits of Participant Funding, stating that it will enhance economic efficiency because merchant generators will be required to take actual transmission upgrade costs into account when determining the most appropriate site for new generation. Further, the Arkansas Commission states that an additional benefit of Participant Funding is that it will remove potential impediments to the development of the transmission grid, e.g., by satisfying local and state requirements that projects that will increase the cost for ratepayers must also provide commensurate benefits.

126. However, Municipal Entities and AEC find that, under the terms of the draft Protocol, it will be very difficult to determine whether a project will be classified exclusively as Base Plan Funded or Participant Funded. In turn, they argue that such a flaw can lead to discriminatory assignments of cost responsibility among users and that Participant Funding fails to recognize the benefits of the integrated transmission system to all users.

127. LEUG and ELCON both state that Participant Funding should be required only in instances where transmission expansion will benefit an identifiable customer or group of customers. LEUG contends that, under Participant Funding, some upgrades will remove congestion for a significant number of customers and provide them with a "free-ride" at the expense of the participant who made the investment in transmission. Therefore, LEUG believes that, in such instances, Participant Funding would be a major deterrent to the construction of transmission upgrades needed to benefit a number of customers.

128. Some intervenors also find that the draft Protocol would unfairly allow the Participating Owners to determine what facilities are subject to Base Plan funding and which facilities will be subject to Participant Funding. Arkansas Cities contends that the Participating Owners must not have the exclusive ability to include Base Plan Funded projects and believes that all market participants should have an opportunity to propose such projects.

129. Calpine argues that the draft Protocol is both unduly restrictive and unnecessarily vague. Calpine states that the draft Protocol sets strict limits on Participant Funding arrangements and specifies the division of labor and responsibility between the funding party, the building party, and the ISA. Instead, Calpine states that parties constructing and financing transmission expansion should be given flexibility in defining their

relationship and assigning risk, liability, and responsibility. Calpine believes that some funding parties may be willing to reduce risk by taking on more responsibility and that the SeTrans RTO should not deny the parties such opportunities.

SeTrans Sponsors' Response

130. SeTrans Sponsors respond that the Participant Funding concept is an important keystone for some SeTrans Sponsors because it assigns the costs of economic expansion of the transmission system to those who seek the economic benefits and cause the costs. SeTrans Sponsors add that Participant Funding is particularly important for those utilities in the Southeast region where an enormous amount of new generation has been announced and where much of the new generation may be exported outside the region rather than used to serve load in the region. According to SeTrans Sponsors, their Participant Funding concept is consistent with the Commission's vision of transmission expansion pricing for Independent Transmission Providers (ITPs) in the SMD NOPR.

131. SeTrans Sponsors state that they have not finalized the Transmission Expansion Funding Protocol and are not seeking Commission approval of this Protocol at this time. SeTrans Sponsors add that they may make changes, and add further details, to that Protocol as it is further developed, including possible revisions in response to the SMD rulemaking.

Commission's Response

132. The Commission's Generator Interconnection Notice of Proposed Rulemaking introduced the idea that participant funding may be an acceptable pricing policy where an independent entity determines: (1) the cost of and responsibility for needed upgrades; (2) the congestion price signals to which the customer responds (along with Congestion Revenue Rights); and (3) the assumptions underlying the power flow analysis.⁴⁴ In the recently issued SMD NOPR, the Commission said it would consider participant funding for proposed transmission facilities that are included in a regional planning process which is conducted by an independent entity, and suggested that the Commission would look favorably upon a consensus pricing policy of state commissions in a region.⁴⁵

133. We will allow participant funding in SeTrans as part of a general framework. The proposal provides the independent administration of a regional planning process that the

⁴⁴See Standardization of Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,560 (2002).

⁴⁵SMD NOPR at P 197-202.

Commission has said is necessary to consider participant funding. The proposal also includes a phasing-in of independent system operation with a market design including locational pricing and FTRs. The approach is also similar to approaches that have been previously accepted by the Commission including the PJM planning and pricing policy. In PJM, new generators pay for network upgrades in order to qualify as network resources and participate in the installed capacity market. Finally, there appears to be a general consensus in the Southeast to have participant funding for those projects that seek an economic expansion of the system if it is developed in an equitable manner. Indeed, many state commissions in the Southeast support the proposed framework.

134. SeTrans Sponsors state that the Transmission Expansion Funding Protocol is still being developed and may be revised as a result of the SMD rulemaking proceeding. Therefore, SeTrans Sponsors explain that they do not seek approval at this time but only seek guidance on their proposal. As a result, we need not rule on the details at this time. We note, though, that the Commission has announced technical conferences on transmission planning and pricing, including participant funding.

135. In further stakeholder discussions and in future filings, we encourage parties to clarify how specific types of investments should be treated, and which fall under Base Plan Funded or Participant Funded Investments. This clarification should also include clear and non-discriminatory criteria for determining what investments are Base Plan Funded or Participant Funded. While the Protocol provides some examples of investments falling into one or the other category, the examples do not adequately address the full range of investments.

V. Cost-Benefit Issues

136. Until a cost-benefit assessment is completed, some protestors find that it would be premature to address whether the organic documents support a governance structure and business model that are consistent with and carry out the purposes of Order No. 2000. Among these protests, which include those filed by several regulatory bodies, there was consensus that a cost-benefit analysis must be presented in order to determine that participation in an RTO is in the public interest. Some of the protestors go even further, and argue that the Commission should delay action on this Petition until a cost-benefit study is completed and analyzed.

137. In its answer, SeTrans Sponsors stress that its Petition does not seek Commission approval of the transfer of control to an ISA, nor approval of its organic documents under section 205 of the FPA. Further, while SeTrans Sponsors recognize that several cost-benefit studies are currently underway, it argues that the pendency of these studies should not delay the Commission's issuance of a ruling on its Petition.

138. While the Commission is aware that several cost-benefit studies are currently underway, we agree with SeTrans Sponsors that our findings in this preliminary order should not compromise the completion of these important cost-benefit studies.

VI. RTO Characteristics and Functions

139. In order for an RTO to adequately address regional operational and reliability issues and to remove opportunities for undue discrimination, the Commission stated in Order No. 2000 that, at a minimum, an RTO must satisfy the four characteristics of independence, scope and regional configuration, operational authority, and short-term reliability.⁴⁶ An RTO is also required to perform eight functions: tariff administration and design; congestion management; parallel path flow; ancillary services; OASIS, TTC and ATC; market monitoring; planning and expansion; and interregional coordination.⁴⁷

140. While the scope of this declaratory order has been limited to those issues addressed above, the Commission accepts SeTrans Sponsors commitment in its Petition and its subsequent answer that the SeTrans RTO will satisfy the necessary characteristics and functions of an RTO, as described in Order No. 2000.

VII. Return on Equity

141. In Order No. 2000, the Commission recognized that the risk profile of the transmission business was changing as the industry restructures. The Commission also recognized that the historical data typically used to evaluate return on equity (ROE) may not be reliable since it reflected an industry structure that was different from the one that was being formed. The Commission stated that it believed that, as patterns of transmission ownership and control evolve, new approaches to compensating transmission owners may be appropriate.

142. As noted earlier, we are very pleased by the progress made to this point by SeTrans Sponsors and the stakeholders. Consistent with our statements in Order No. 2000 and in order to encourage progress in getting the SeTrans RTO in operation in a timely manner, we are open to the idea of allowing the transmission owners in the SeTrans footprint the opportunity to earn an incentive ROE when the SeTrans RTO becomes operational. In this connection, we note that, recently, in Midwest Independent

⁴⁶Order No. 2000 at 30,993-94.

⁴⁷Id.

System Operator, Inc., 100 FERC ¶ 61,292 (2002), we allowed the Midwest ISO's participating transmission owners to receive an upward adjustment of 50 basis points in their ROEs for turning over the operational control of their transmission facilities.⁴⁸

VIII. One Further Comment

143. As the SeTrans Sponsors use the guidance provided in this order in the next phase of their work, we encourage them to continue working closely with state regulators and affected stakeholders to address the remaining unresolved issues. We find that it would benefit the Commission and the parties for SeTrans Sponsors also to provide the Commission with periodic updates on progress, including a timeline of anticipated operational milestones.

The Commission orders:

SeTrans Sponsors' petition for a declaratory order is hereby granted, as discussed in the body of this order. The Commission makes no findings with regard to any other issue or proposal raised in, or raised in response to, this filing.

By the Commission. Commissioner Massey dissenting in part with a separate statement attached.

(S E A L) Commissioner Breathitt dissenting in part with a separate statement attached.

Magalie R. Salas,
Secretary.

⁴⁸The Commission has indicated that it intends to address this matter in a separate policy statement.

Motions and Notices to Intervene

Alabama Public Service Commission (Alabama Commission)
Central Electric Power Cooperative, Inc.
Dynegy Power Marketing, Inc.
El Paso Merchant Energy, L.P.
Gainesville, Florida; City of
Kissimmee Utility Authority
Lakeland, Florida; City of
Marketplace Company Development Ltd; Nord Pool Consulting; & LECG, LLC (jointly).
Oglethorpe Power Corporation
Seminole Electric Cooperative, Inc.
Southeastern Power Administration
Tractebel Energy Marketing, Inc.*
TXU Energy Trading Company

Motions and Notices to Intervene, Protests, and/or Comments

Alabama Electric Cooperative, Inc. (AEC)
Alabama Municipal Electric Authority (AMEA)
Arkansas Cities (on behalf of the Clarksville Light & Water Co.; Conway Corp.; Hope
Water & Light Commission; City Water & Light Plant of Jonesboro, Arkansas;
Paragould Light & Water Commission; West Memphis Utilities Commission; and
the Cities of Benton; Bentonville; North Little Rock; Oseloa; Piggott; Prescott;
and Siloam Springs, Arkansas).
Arkansas Electric Cooperative Corporation
Arkansas Public Service Commission (Arkansas Commission)
Calpine Corporation; Mirant Americas, Inc.; Mirant America Energy Marketing, LP; Teco
Power Services Corporation; and Williams Energy Marketing & Trading Company
(collectively "Calpine").
Dominion Virginia Power (Dominion Virginia)
Duke Energy North America, LLC (Duke)
Electric Power Supply Association (EPSA)

ElectriCities of North Carolina, Inc.; Piedmont Municipal Power Agency; Louisiana Energy and Power Authority; Lafayette Utilities System; the Municipal Energy Agency of Mississippi; and the Cities of Orangeburg, and Seneca, South Carolina (collectively "Municipal Entities").

Electricity Consumers Resource Council; American Iron and Steel Institute; and American Chemistry Council (collectively "ELCON")

Florida Public Service Commission (Florida Commission)

Georgia Public Service Commission (Georgia Commission)

Louisiana Energy Users Group (LEUG)

Louisiana Public Service Commission (Louisiana Commission)

Mississippi Delta Energy Agency; the Clarksdale Public Utilities Commission; and the Public Service Commission of Yazoo City (collectively "Mississippi Delta").

Mississippi Public Service Commission (Mississippi Commission)

New Orleans, Council of the City of (New Orleans Council)

NRG Companies (NRG)

Occidental Chemical Corporation

Steel Producers

Texas, Public Utility Commission of (Texas Commission)

Williams Energy Marketing & Trading Company (Williams)

*out-of-time

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Cleco Power LLC; Dalton Utilities (acting as agent for the City of Dalton, Georgia); Entergy Services, Inc. (acting as agent for Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, inc.); Georgia Transmission Corporation; JEA (formerly Jacksonville Electric Authority); MEAG Power; Sam Rayburn G & T Electric Cooperative Inc.; South Carolina Public Service Authority; Southern Company Services, Inc. (acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company); and the City of Tallahassee, Florida.

Docket No. EL02-101-000

(Issued October 10, 2002)

MASSEY, Commissioner, dissenting in part:

Market participants in the Southeast have made great strides toward grid regionalization and a wholesale electricity market design that will enhance an efficient and reliable supply of electricity for customers. I applaud their efforts and support most aspects of today's order, including our affirmation of locational marginal pricing, participant funding, and independence of grid management.

Today's order, however, adopts a significant policy shift that, in the limited time I have had to consider it, strikes me as ill advised. Paragraph two of the order states that "unless the Commission has specifically indicated in this order that an element of the RTO proposal is inconsistent with the SMD proposal or needs further work in light of the SMD proposal, we do not intend, in the final SMD rule, to revisit prior approvals or acceptances of RTO provisions because of possible inconsistencies with the details of the final rule." In other words, unless we have explicitly flagged an aspect of the SeTrans proposal in this order, it is immune to whatever we adopt in a SMD final rule.

This declaration unnecessarily ties the Commission's hands in developing regional electricity markets. My strong support for our SMD rulemaking was based on an expectation that the best elements of market design would be identified and would

become the standard for wholesale markets. Of course, regional variations on the standard would be allowed where needed to accomplish the objectives of our SMD initiative. Also, we have said that our debates and decisions with respect to evolving RTO policy would inform our SMD policy (and vice versa). But with today's order, before we have finalized a standard, indeed before we have even received any formal comments on the SMD NOPR, the Commission is determining key regional standards in RTO orders and binding itself not to change its mind, even if the forthcoming NOPR comments (including an extensive outreach process) lead us to conclude that other standard terms or other regional variations would be more appropriate. Moreover, it is no secret that, because RTO formation is voluntary under Order No. 2000, the Commission has taken a liberal approach to accepting less than state of the art RTO proposals with the objective of encouraging regions to progress toward RTO formation. I am concerned that subordinating aspects of our SMD policy to provisions agreed to in RTO venues risks compromising the objectives of SMD: eliminating undue discrimination, ensuring customer protection, and creating seamless efficient wholesale electricity markets.

Finally, promising not to revisit certain decisions is a highly unusual administrative procedure that gives me great concern. Many unforeseen factors could render today's decisions ill advised. As a regulator and policy maker, I must remain open to reconsidering decisions in light of new information and our evolving policy. Policy evolution has been constant during my two terms as a Commissioner. An evolving policy, within applicable legal authority, allows a regulatory agency to keep pace with the changing times.

For these reasons, I dissent in part from this order.

William L. Massey
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Cleco Power LLC; Dalton Utilities (acting as agent for the City of Dalton, Georgia); Entergy Services, Inc. (acting as agent for Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc.); Georgia Transmission Corporation; JEA (formerly Jacksonville Electric Authority); MEAG Power; Sam Rayburn G & T Electric Cooperative Inc.; South Carolina Public Service Authority; Southern Company Services, Inc. (acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company); and the City of Tallahassee, Florida.

Docket No. EL02-101-000

(Issued October 10, 2002)

Breathitt, Commissioner, dissenting in part:

I disagree with the majority on an issue of governance and for that reason I will be issuing a partial dissent in what is otherwise a well thought out and very positive order.

Today's order puts forth a new Commission policy stating that where voting rights in stakeholder committees are limited to allow only one vote from any single market participant (including its affiliates), the Commission will also enforce a participation limitation. This limitation would permit each market participant (including all of its affiliates) to participate in only one stakeholder group, regardless of the limitations on that market participant's voting rights. The order's sole rational for this is new policy is that recent RTO governance structures acted on by this Commission have similar participation limitations in the makeup of their stakeholder groups. The order fails to cite specific orders in which we have acted on such governance structures.

I do not support these arbitrary limitations on participation in meetings of the stakeholder groups. I believe that stakeholder meetings should be open to all to attend and for all to have input. Limitations on voting rights are the appropriate method for ensuring independence and equal impact on decisions by the stakeholder groups.

Further, although I have not been able to review all of the recent RTO governance structures where we have given the Commission's nod of approval, I do not believe we have ever required such a restriction on participation in the stakeholder groups. There is an important distinction to be made between voting rights and participation, one the majority fails to make.

In fact, my review of the RTO West order issued last meeting, indicates that we approved RTO West Applicants' compliance filing making required changes to their governance structure.⁴⁹ More to the point, in the underlying order requiring the compliance filing, the Commission affirmed that the RTO West Bylaws allow for broad participation in three stakeholder groups by two types of market participants (large retail customers and trade organizations), but failed to note whether RTO West's proposal contains a specific limitation on participation by each market participant (including their affiliates) to a single stakeholder group.⁵⁰ In light of the new policy in today's order, this seems to be an important omission.

For the foregoing reasons, I respectfully dissent.

Linda K. Breathitt
Commissioner

⁴⁹100 FERC ¶ 61,274 at 62,054 (2002).

⁵⁰ 95 FERC ¶ 61,114 at 61,328 - 29 (2001).